Supreme Court, U.S.
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# 92-814

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

PEPPER BURNS INSULATION, INC.

Petitioner,

v.

ARTCO CONTRACTING, INCORPORATED,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## QUESTION PRESENTED

In a suit instituted under the Miller Act, 40 U.S.C. §§ 270a-270f, is the required notice effectively given when it is placed in the mail on the eighty-fifth day after the last day of work, well within the ninety-day time period set forth by the statute?

## RULE 29.1 LIST

Petitioner Pepper Burns Insulation, Inc. has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioner Pepper Burns Insulation, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled proceeding on July 10, 1992.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 970 F.2d 1340 and is reprinted in the appendix hereto, p. App. 15, infra.

The decision of the United States District Court for the Eastern District of North Carolina (Howard, J.) has not

been reported. It is reprinted in the appendix hereto, p. App. 12, infra. By its terms, it adopts the Memorandum and Recommendation and Order of Magistrate Judge McCotter which has not been reported. It is reprinted in the appendix hereto, p. App. 1, infra.

## JURISDICTION

The petitioner brought this action in the Eastern District of North Carolina pursuant to 40 U.S.C. §§ 270a and 270b, and 28 U.S.C. § 1331. On July 9, 1991, the Eastern District granted petitioner's motion for summary judgment against respondent. See p. App. 12, infra.

On respondent's appeal, the Fourth Circuit on July 10, 1992, entered a judgment and an opinion reversing the Eastern District's order and directing that petitioner's case against respondent be dismissed. See p. App. 15, infra. On August 12, 1992, the Fourth Circuit denied a timely petition for rehearing with a suggestion of rehearing en banc.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

40 U.S.C. § 270b. **Rights of persons furnishing labor or material**

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d of this title and who

has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was

supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

## STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 because the cause of action arose from federal statutes, 40 U.S.C. §§ 270a-270f.

In March 1987, respondent Artco Contracting, Inc. ("Artco") contracted with the U.S. Army Corps of Engineers to construct the SOCOM Operations Complex at Fort Bragg, North Carolina. As required by § 1(a) of the Miller Act, 40 U.S.C. § 270a(a), Artco executed a payment bond designed to protect subcontractors and suppliers furnishing labor and material to the project.

Pyramid Contracting, Ltd. ("Pyramid") executed a subcontract with Artco. Pyramid then sub-subcontracted with petitioner, Pepper Burns Insulation, Inc. ("PBI"), to provide labor and materials to the project. PBI's second-tier subcontract called for it to receive $59,466.00 for its work.

PBI last performed work for or supplied materials to the project on July 27, 1989, and submitted invoices to Pyramid for payment. Pyramid paid all but $18,946.60 due PBI. Neither Pyramid nor anyone else associated with the project ever indicated that there were any problems with PBI's work; nevertheless, Pyramid did not pay PBI in full.

PBI then sought recovery of the unpaid balance from Artco and its sureties under the payment bond.[1] As the principal on the payment bond, Artco was liable to PBI just as were its sureties. PBI sent notice of its claim under the bond to Artco by certified mail.[2] To comply with the Miller Act, PBI had no mean~ other than mail by which to notify Artco. PBI's notice was mailed on October 20, 1989, eighty-five days after the last day of work. Artco signed the receipt for the notice on October 31, 1989, more than ninety days after PBI last performed work for, or supplied materials to, the project.

When PBI received no response to its claim, PBI filed suit against Artco. After Artco answered, PBI moved for summary judgment. Artco also moved for summary judgment contending, among other things, that PBI failed

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[1] Artco had not furnished a commercial surety for this project; Artco's sureties were two individuals. With the help of the Corps of Engineers, PBI located one of the two individuals -- in federal prison serving time for surety fraud. The second individual surety has never been located, although someone in a hotel in Oklahoma signed the return receipt for the package containing the complaint.

[2] Although 40 U.S.C. § 270b provides for the use of registered mail, judicial opinions since 1940 have held that written notice by regular and certified mail is sufficient. See Fleisher Engineering v. United States ex rel. Hallenbeck, 311 U.S. 15, 61 S.Ct. 81, 85 L.Ed. 12 (1940); United States ex rel. Franklin Paint Co. v. Kagan, 129 F. Supp. 331 (D.C. Mass. 1955); Liles Constr. Co. v. United States, 415 F.2d 889 (5th Cir. 1969); United States ex rel. Carter-Schneider-Nelson, Inc. v. Campbell, 293 F.2d 816 (9th Cir. 1961). Further, Artco has never asserted that PBI's notice was defective due to being sent by certified mail rather than by registered mail.

to give the requisite notice in a timely fashion. The district court granted PBI's motion for summary judgment. See p. App. 12, infra.

Artco appealed to the Fourth Circuit which reversed the Eastern District. The Fourth Circuit considered one issue: whether 40 U.S.C. § 270b(a) requires that a subcontractor's notice be mailed or that it actually be received before the expiration of ninety days after the last day the subcontractor's labor or materials were provided to the job. The Fourth Circuit held that "the statute's language requires actually notifying the contractor." (p. App. 22, infra). The Fourth Circuit concluded that had the drafters meant only to require mailing of the notice, then the statute would contain language other than "giving written notice." Id. As a result of this conclusion, the Fourth Circuit reversed the Eastern District's order granting summary judgment to PBI and remanded the case for entry of an order dismissing the case against Artco.

## REASONS FOR GRANTING THE WRIT

### I.

**The Fourth Circuit's holding that 40 U.S.C. § 270b requires actual receipt of the requisite notice within the ninety-day period set forth by the statute conflicts with a decision of the Second Circuit and decisions of other courts.**

The Fourth Circuit has interpreted the Miller Act language "upon giving written notice" to mean that the prime contractor must actually receive the subcontractor's notice within the 90-day statutory period. This decision

affects the procedure for, and viability of, subcontractor and supplier bond claims on nearly all federal construction projects. This decision creates a huge obstacle for subcontractors and suppliers, and allows prime contractors and sureties to avoid their statutorily-imposed obligations merely by not accepting registered or certified mail. The Fourth Circuit's decision prejudices just those entities that the Miller Act was designed to protect. It is a decision and result that deserve this Honorable Court's attention.

The Fourth Circuit's decision conflicts with the Second Circuit's affirmance of a decision addressing the exact issue. In United States ex rel. Lincoln Electric Products Co., Inc. v. Greene Electrical Service of Long Island, Inc., 252 F. Supp. 324 (E.D.N.Y. 1966), a supplier of electrical equipment was not paid by the first-tier subcontractor with whom it had contracted. The Miller Act notice was mailed, but not received within the 90-day period. The trial court held that "the last day for the mailing of such notice was March 23, 1965, the end of the 90th day following December 23, 1965."[3] Id. at 327 (emphasis in original). The court disagreed with the prime contractor's contention that notice had to be actually received within 90 days. Id. The trial court also discussed whether the supplier was estopped because it failed to inform the general contractor that it had received a check from the subcontractor which was dishonored by the bank and because it continued to work after the check was dishonored. The trial court found no estoppel. Id.

On appeal, the Second Circuit discussed the estoppel issue at length and did not specifically discuss the issue of

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[3] The last day of work was December 23, 1964; the typographical error appears in the published opinion.

timeliness of notice. However, the entire lower court opinion was affirmed. United States ex rel. Lincoln Electric Products Co., Inc. v. Greene Electrical Service of Long Island, Inc., 379 F.2d 207 (2d Cir. 1967). By affirming the district court opinion containing the notice discussion, the Second Circuit adopted that opinion as its own.

In Lincoln Electric, the District Court relied heavily on another decision where the issue of mailing or receipt of the notice within the ninety-day period was dispositive. In United States ex rel. Crowe v. Continental Casualty Co., 245 F. Supp. 871 (E.D. La. 1965), the only issue before the court was whether notice was timely if mailed, by registered mail, on the ninetieth day. The court first noted that statutes authorizing service of notice by registered mail have frequently been construed to mean that service is effective when the notice is properly addressed, registered, and mailed. Id. at 873; see also 58 Am. Jur.2d Notice § 27; Johnson Service Co. v. Climate Control Contractors, Inc., 478 S.W.2d 643 (Tx. Civ. App. 1972); Davis v. Moseley, 55 S.E.2d 329 (N.C. 1949). The court went on to say:

> In addition to providing for notice by registered mail, the Miller Act permits notice "in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons." These express methods both guarantee verification through an uninterested party of the date notice was dispatched, thereby precluding factual controversies on questions relating to date of sending and date of receipt. Faced with a

> choice of selecting between date of actual receipt and date of dispatch in a manner calculated to assure receipt, the language employed by Congress expresses an intent to favor those third-tier contractors who delay sending notice until the last day, rather than favoring general contractors inclined to remit payments on the 91st day. This accords with the Supreme Court's direction to give the Miller Act "a reasonable construction in order to effect its remedial purpose * * *." Fleisher Engineering & Construction Co. v. United States, 311 U.S. 15, 18, 61 S.Ct. 81, 83 (1940). (emphasis added)

Id. at 873-874. Although the Crowe court's analysis is a common sense approach, the Fourth Circuit chose not to follow it.

The decision of the Fourth Circuit also conflicts with many state court decisions construing the notice provisions of mechanics' lien statutes. 6S Corp. v. Martinez, 831 P.2d 509 (Colo. App. 1992); Sheridan Ready Mix, Inc. v. First Congregational Church of Plentywood, 695 P.2d 456 (Mont. 1985); State-Wide Constr., Inc. v. Dowda, 418 So.2d 1238 (Fla. App. 1982); Riley v. Abrams, 412 A.2d 996 (Md. 1980); Daly Aluminum Products, Inc. v. Stockslager, 244 So.2d 528 (Fla. App. 1970); A.C. Scagnetti & Sons v. Pleister, 175 N.E.2d 81 (Ohio 1961); Apex Roofing Supply Co. v. H.W. Elliot Co., 52 N.J. Super. 522, 145 A.2d 823 (Union County Ct. 1958). These cases all hold that notice must only be mailed within the statutory period for giving notice; in other words, service is effective upon mailing.

The Fourth Circuit has created precedent which directly conflicts with the law of other Circuits and with much state law. This Honorable Court should eliminate much confusion by considering this matter.

## II.

**The decision below, requiring a subcontractor's Miller Act notice to be actually received within the ninety-day period, raises important policy considerations affecting government projects.**

The Fourth Circuit's decision impacts each and every subcontractor, supplier, prime contractor, and surety on all federal construction projects in this country which exceed $25,000.00. The decision creates uncertainty for subcontractors and suppliers as to the date the notice must be sent to recover on a required bond. The decision also creates an avenue for prime contractors and sureties to avoid their statutory obligations simply by not picking up registered or certified mail.

The Miller Act was designed and enacted to protect from nonpayment those who furnish labor and materials to federal construction projects. United States ex rel. Sherman v. Carter, 353 U.S. 210, 216, 77 S.Ct. 793, 796 (1957); Noland Co., Inc. v. Allied Contractors, Inc., 273 F.2d 917 (4th Cir. 1959); United States ex rel. Honeywell, Inc. v. A&L Mechanical Contractors, Inc., 677 F.2d 383 (4th Cir. 1982); United States ex rel. Martin Steel Constructors, Inc. v. Avanti Constructors, Inc., 750 F.2d 759 (9th Cir. 1984). If the second-tier subcontractor is not paid, he can give notice under the Miller Act, which requires that the prime contractor and its surety post a

payment bond for his benefit.[4] Because United States marshals no longer serve private civil notices or other papers in most districts, service of the notice by certified or registered mail is often the only practical means of giving notice that is authorized by the Miller Act.

Requiring that the prime contractor actually receive a subcontractor's notice within the 90-day period after the subcontractor finishes his work makes indefinite the date on which the second-tier subcontractor must mail his notice. In practice, the Fourth Circuit's requirement puts the Miller Act in conflict with itself -- the 90-day period expressly set forth in the Act is not 90 days, it is something less than 90 days, and may be substantially less depending on how hard it is to achieve actual receipt of the notice upon the prime contractor. Since payments under most construction contracts follow a monthly cycle, a second-tier subcontractor's invoice for payment is often not past due until 30 to 45 days after he completes his work. The Fourth Circuit's ruling gives such subcontractor or supplier very little time to contact the appropriate parties and investigate the situation after his payment due date has passed. Instead, the subcontractor's notice must be sent immediately to (hopefully) insure receipt within the 90

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[4] The prime contractor may easily protect himself from second-tier subcontractor claims by requiring a lien waiver signed by second-tier subcontractors before making payment to the first-tier subcontractor. Alternatively, the prime contractor may issue a joint check.

days.[5] This sort of rush is not what Congress intended in enacting the 90-day time period.

Requiring receipt of a subcontractor's notice within the ninety-day period also gives prime contractors and their sureties, those statutorily responsible for payment, an easy means to avoid liability and thwart the purpose of the Miller Act -- simply by refusing to sign for registered or certified mail. A prime contractor can refuse all registered mail and never actually receive notice of a claim, or a contractor can refuse registered mail until the ninety-day period has passed. No matter which method a contractor chooses, it can effectively avoid paying subcontractor claims which it is obligated to pay under the Miller Act if actual receipt of the notice is required within the ninety-day period. Congress never intended such a result.

The notice that must be given by a subcontractor or supplier having no direct contractual relationship with the prime contractor is discussed only in § 270b(a). Section 270b states that notice must be "given" within ninety days after the last day of the subcontractor's work. The language of § 270b contains no mention of receipt by the contractor within the ninety-day period.

The plain meaning of the statute requires that the claimant make a diligent effort to give the contractor actual

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[5] Significantly, a § 270b subcontractor cannot give earlier notice -- he must wait until after his last day of work. United States ex rel. Kinlau Sheet Metal Works, Inc. v. Great American Ins. Co., 537 F.2d 222 (5th Cir. 1976); United States ex rel. San Joaquin Blocklite v. Lloyd E. Tull, Inc., 770 F.2d 862 (9th Cir. 1985); National Union Indem. Co. v. R.O. Davis, Inc., 393 F.2d 897 (5th Cir. 1968).

notice. This is clear because the statute sets forth only two methods of service of the notice -- registered mail and marshal service. Both of these are designed to assure certainty as to date of receipt as well as the date of dispatch. But once mailed (or given to the United States marshal, as could be done formerly), the timing of service is out of the claimant's control.

Using certified or registered mail (and, for that matter, the marshal's service) assures that an unbiased third party keeps a record of the date of dispatch, the means of service, and the attempts at service. The post office also obtains and returns to the sender a record of actual receipt, but does not insure delivery or insure that delivery will occur promptly. The post office cannot guarantee a delivery date to the addressee. If § 270b is read to require an absolute delivery date, a claimant who uses the mails, even registered or certified, may not know whether the delivery date is in jeopardy until it is too late. However, the plain meaning of the statute does not require receipt within a certain time.

Construing the notice provision to require only mailing (and not also receipt) within ninety days makes the use of the statutory phrase "notice shall be served" in § 270b consistent with Fed. R. Civ. P. 5(b), which states service by mail is complete upon mailing. Conversely, requiring receipt within the statutory ninety-day period reduces by an indefinite period the time during which a claimant must commence giving notice. Requiring receipt within ninety days forces claimants to weigh several variables in determining when to mail the notice: (i) the efficiency of the postal service, (ii) the number of holidays when no mail will be delivered, (iii) the distance between the point of mailing and the point of receipt, (iv) the

frequency that the receiving post office will deliver its cards showing it is holding registered or certified mail, (v) the availability of the recipient, (vi) the distance between the recipient's business and the post office holding the mail, (vii) other logistics including the receiving post office's office hours (in some cases only a few hours per day and only a few days per week), and (viii) the willingness of the recipient to sign for its mail. Each of these variables is beyond the claimant's control and each will differ from job to job. No subcontractor or supplier will ever be able to calculate the time for giving notice in the same way for two different jobs. Requiring receipt within ninety days eliminates any precise method for determining when notice must be given and forces claimants to guess when notice will be received, because receipt is an element claimants cannot control.

Requiring receipt within ninety days puts an onerous burden on suppliers and subcontractors, who are exactly the entities the Miller Act was enacted to protect. The court below became the first and only court to deny recovery to a claimant solely because its notice was not received within the ninety-day period. Such a requirement cannot be found by reading the statute. The plain meaning of the language of the Act requires only mailing of the notice, not actual receipt, within the ninety-day period.

The Fourth Circuit's opinion affects all federal construction projects in excess of $25,000.00 underway today and all such future projects. As a result of this decision, subcontractors and suppliers to such projects -- exactly those entities the Miller Act is designed to protect -- are left with no firm guidelines for when they must give notice. Such a result creates enormous problems for those claimants and significantly undercuts the Miller Act's protection.

This Honorable Court can provide guidance necessary to allow proper and uniform application of the Miller Act.

## CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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November 10, 1992

# APPENDIX

## APPENDIX


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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
FAYETTEVILLE DIVISION

NO. 90-70-C8V-3-H

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| UNITED STATES OF AMERICA, for the benefit and use of PEPPER BURNS INSULATION, INC., and PEPPER BURNS INSULATION, INC., in its own capacity, | ) | |
| Plaintiff, | ) | MEMORANDUM AND RECOMMENDATION |
| v. | ) | AND ORDER |
| PYRAMID CONTRACTING, LTD., ARTCO CONTRACTING, INC., JAMES P. MCCLAIN, and SHARON L. JELOVCHAN, | ) | |
| Defendants. | ) | |

This is a Miller Act action filed pursuant to 40 U.S.C. §§ 270a, et seq. The complaint alleges breach of contract against Pyramid Contracting, Inc. (Pyramid), breach of payment bond obligations by Artco Contracting, Inc. (Artco), and breach of payment bond obligations by

James P. McClain and Sharon L. Jelovchan. The case has been referred to me by United States District Judge Malcolm J. Howard for memorandum, recommendation and order on the following pending motions: Defendant Artco's Motion to Certify Order for Immediate Appellate Review, Plaintiff PBI's Motion for Summary Judgment Against Artco Contracting, Inc., Defendant Artco's Cross-Motion for Summary Judgment, Plaintiff PBI's Motion for Leave to Amend Complaint.

## A. PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

Plaintiff Pepper Burns Insulation, Inc. (PBI) moves to amend the complaint for the sole purpose of changing the date in paragraph 14 of the complaint from October 29, 1989, to October 20, 1989, that being the date of mailing of the Miller Act notice.

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave for amendment of pleadings "shall be freely given when justice so requires." Island Creek Coal Co. v. Lake Shore, Inc., 832 F.2d 274 (4th Cir. 1987). Whether to allow a motion to amend is within the discretion of the court. Foman v. Davis, 371 U.S. 178 (1962). In exercising its discretion, the court should focus on the concerns of prejudice, futility or bad faith. Davis v. Piper Aircraft Corp., 615 F.2d 606 (4th Cir. 1980); Island Creek Coal Co. v. Lake Shore, Inc., supra.

Plaintiff states the date October 29, 1989, was a typographical error which was later repeated in documents supporting PBI's Motion for Summary Judgment. Artco opposes the motion to amend, citing futility of the amendment. Artco argues that even if notice were mailed within

the 90-day period, it also must have been received within the 90-day period in order to comply with the requirements of the Miller Act.

Title 40 U.S.C.A. § 270b states in pertinent part:

> [A]ny person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor . . .. Such notice shall be served by mailing the same registered mail.

In United States ex rel. Lincoln Electric Products Co., Inc. v. Greene Electrical Service of Long Island, Inc., 252 F. Supp. 324, 327 (E.D.N.Y. 1966), the court held that "the last day for mailing of such notice was . . . the end of the 90th day . . .." "Statutes authorizing service of notice by mail have frequently been construed to mean that service is effective when the notice is properly addressed, registered and mailed." U.S. ex rel. Crowe v. Continental Casualty Co., 245 F. Supp. 871, 873 (E.D. La. 1965). The court further stated that "the language employed by Congress [in the Miller Act] expresses an intent to favor those third-tier contractors who delay sending notice until the last day . . .." Id. at 873-874.

Based upon the face of the Act and existing case law, the court concludes that if mailed within the 90-day period, notice need not be received within the 90-day

period in order to be timely given. The amendment is not futile, nor is it made in bad faith. The amendment will not result in prejudice to the defendant Artco, as it does not involve new issues or alter the nature of the claim or the potential liability of Artco. Nor will the amendment result in delay. Justice requires that the Motion to Amend be ALLOWED. The Clerk shall file the amended complaint. Artco shall have until June 25, 1991, to file any further response to the complaint as amended.

B. Plaintiff PBI's Motion for Summary Judgment Against Artco

C. Defendant Artco's Motion for Summary Judgment

PBI contends that summary judgment under Fed. R. Civ. P. 56 is appropriate as to its second claim for relief, as there is no material fact at issue. In the second claim for relief, PBI alleges a claim of breach of payment bond obligations against Artco. Artco, in its cross-motion for summary judgment, does not contest the facts nor that notice was given, only the law as it relates to date of notice and filing of suit. Artco contends that PBI is not entitled to summary judgment because PBI has not shown that it gave notice to Artco within the 90-day period or filed suit within the one-year period as prescribed by the Act. Even had this been a valid argument, with the amendment to the complaint allowed herein it is not a factual issue. Because there is no material fact in dispute, the motion for summary judgment of PBI should be ALLOWED and Artco's Motion for Summary Judgment should be DENIED.

## Findings of Fact

1. On or about March 23, 1987, Artco contracted with the United States through the Army Corps of Engineers to construct the SOCOM Operations Complex at Fort Bragg, North Carolina.

2. On or about July 27, 1987, Artco, as principal, and McClain and Jelovchan, as sureties, executed a payment bond for the project. Defendant Pyramid was a subcontractor on the project. Artco, as principal, and McClain and Jelovchan, as sureties, agreed to pay PBI if Pyramid failed to do so. The payment bond includes this language:

> We, the Principal and Surety(ies), are firmly bound to the United States of America in the above penal sum. For payment of the penal sum, we bind ourselves . . . jointly and severally . . ..
>
> The above obligation [the Sureties' obligation to pay] is void if the principal promptly makes payment to all persons having a direct relationship with the Principal or a subcontractor of the Principal for furnishing labor, material, or both in the prosecution of the work provided for in the contract identified above [the contract for the construction of this project].

3. On or about June 2, 1987, PBI entered into a written contract with Pyramid to furnish labor and materials for the project. PBI was to be paid $59,466.00 for its work on the project.

4. PBI performed work and supplied materials for the project from about November 12, 1988, until about July 27, 1989. PBI received $40,519.40 from Pyramid, and $18,946.60 remains due and owing. PBI gave notice to Artco and Pyramid of its claim on October 20, 1989, pursuant to 40 U.S.C. § 270b.

5. Artco executed the payment bond and admits that Pyramid owes to PBI the sum of $18,946.60.

6. Notice was given to both Artco and Pyramid by certified mail of PBI's claim before the expiration of 90 days following PBI's last day of work. Both Pyramid and Artco received this notice.

7. PBI has performed its obligations under the contract with Artco's subcontractor, Pyramid.

8. Artco, as principal, and McClain and Jelovchan, as sureties, are obligated under the payment bond to pay PBI the amount of $18,946.60 and have failed to do so.

9. This lawsuit was filed on July 27, 1990. Only Artco has answered. Entries of default were entered against the defendants McClain and Pyramid. Jelovchan has not been served with process. Pyramid has filed Chapter 7 bankruptcy, and the proceedings against Pyramid or its property interests are automatically stayed pursuant to 11 U.S.C. §§ 362 and 541.

## Conclusions of Law

Summary judgment is appropriate under Fed. R. Civ. P. 56 if there is no genuine issue of material fact and

the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

In the present case, when Artco, as principal, and McClain and Jelovchan, as sureties, executed the payment bond, they agreed to pay PBI if Pyramid failed to do so. In its answer, Artco admitted that the bond was executed pursuant to the Miller Act and that Pyramid does in fact owe $18,946.60 to PBI.

PBI has also met the requirements of the Miller Act. Proper and timely notice under the Miller Act was given to Artco and Pyramid. PBI has fulfilled the procedural requirements of 40 U.S.C. §§ 270a-270d. No payment was received after service of the notice. This lawsuit was timely filed. Artco, as principal, and McClain and Jelovchan, as sureties, have not paid PBI as required by the payment bond. As a result, PBI has suffered damages in the amount of $18,946.60. The court, in its discretion, should award PBI pre-judgment interest at the North Carolina legal rate of eight per cent (8%) per annum from October 20, 1989, the date PBI gave notice to Artco of its claim, until the entry of final judgment against Artco and McClain. U.S. v. American Mfrs. Mut. Cas. Co., 901 F.2d 370 (4th Cir. 1990); N.C.G.S. §§ 24-1, -5.

McClain is one of the sureties on the bond. Entry of default has been entered against McClain. As a surety, McClain is jointly and severally liable with Artco for the amount of the bond plus interest.

PBI is entitled to the entry of final judgment against Artco and McClain, jointly and severally, in the amount of $18,946.60 plus pre-judgment interest from October 20, 1989, until the date of entry of judgment and post-judgment

interest thereafter until paid, at a rate equal to the coupon issue yield of the average receipted auction price for the last auction of 52-week United States Treasury bills settled immediately prior to the date of judgment. The action against the defendant Sharon L. Jelovchan should be DISMISSED without prejudice for failure to serve process pursuant to Rule 12(b)(5).

Accordingly, PBI's motion for summary judgment should be ALLOWED and the cross-motion of defendant Artco should be DENIED. The action against the defendant Sharon L. Jelovchan should be DISMISSED without prejudice. Pursuant to Rule 54(b), Fed. R. Civ. P., the court should direct the entry of final judgment as to PBI's claim against Artco, as there is no just reason for delaying entry of final judgment pending resolution of the only remaining claim, PBI's stayed claim against Pyramid. The plaintiff shall advise the court on or before June 25, 1991, the status of the plaintiff's claim against Pyramid, including whether the plaintiff wishes to continue to pursue the claim in light of the bankruptcy proceedings or to dismiss the proceedings without prejudice against Pyramid pending the outcome of the bankruptcy proceedings.

D. Defendant Artco's Motion to Certify Order for Immediate Appellate Review Pursuant to 28 U.S.C. § 1292(b)

Artco has filed a motion to certify the court's Order of October 16, 1990, denying Artco's motion to dismiss, for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The motion should be DENIED.

On October 16, 1990, United States District Judge Malcolm J. Howard entered an Order denying Artco's

motion to dismiss. The motion to dismiss was based on the plaintiff's failure to file suit within the Miller Act one-year statute of limitations, 40 U.S.C. §§ 270(a) - 270(d). The issue in the motion was whether Rule 6(a) of the Fed. R. Civ. P. applied to suits arising under the Miller Act. If Rule 6(a) did not apply, the defendants' motion to dismiss would be granted. Judge Howard found that Rule 6(a) did apply and denied the motion to dismiss. Artco requests the opportunity to present an interlocutory appeal because of a split of federal caselaw authority on this issue.

Under 28 U.S.C. § 1292(b), Artco may appeal Judge Howard's order of October 16, 1990, only if Judge Howard amends his order to state that he is of the opinion the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal of the order may materially advance the ultimate termination of the litigation. I specifically find that an immediate appeal of the order does not materially advance the ultimate termination of this litigation, and the motion to certify for interlocutory appeal should be DENIED. Furthermore, if the court grants the plaintiff's motion for summary judgment, as recommended, Artco will be entitled to regular appeal based on entry of final judgment against Artco.

## SUMMARY

1. The motion of plaintiff PBI to amend the complaint is ALLOWED. The defendant Artco shall have until June 25, 1991, to file any further response to the complaint as amended.

2. The motion of plaintiff PBI for summary judgment against the defendant Artco as to PBI's second claim for relief should be ALLOWED.

3. Defendant Artco's motion for summary judgment against PBI should be DENIED.

4. The action should be DISMISSED without prejudice as to the defendant Sharon L. Jelovchan.

5. The motion of defendant Artco to certify order for appellate review should be DENIED.

6. PBI is entitled to the entry of final judgment against Artco and McClain, jointly and severally, in the amount of $18,946.60 plus pre-judgment interest from October 20, 1989, until the date of entry of judgment, and post-judgment interest thereafter until paid, at a rate equal to the coupon issue yield of the average receipted auction price for the last auction of 52-week United States Treasury bills settled immediately prior to the date of judgment.

7. The plaintiff shall advise the court on or before June 25, 1991, the status of the plaintiff's claim against Pyramid, including whether the plaintiff wishes to continue to pursue the claim in light of the bankruptcy proceedings or to dismiss the proceedings without prejudice against Pyramid pending the outcome of the bankruptcy proceedings.

THIS MEMORANDUM AND RECOMMENDATION ENTERED, this the 12th day of June, 1991.

/s/ Charles K. McCotter, Jr.
CHARLES K. McCOTTER, JR.
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

NO. 90-70-CIV-3-H

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, for the benefit and use of PEPPER BURNS INSULATION, INC., and PEPPER BURNS INSULATION, INC., in its own capacity, | ) | |
| Plaintiff, | ) | |
| v. | ) | ORDER |
| PYRAMID CONTRACTING, LTD., ARTCO CONTRACTING, INC., JAMES P. MCCLAIN, and SHARON L. JELOVCHAN, | ) | |
| Defendants. | ) | |

This matter is before the court on defendant Artco Contracting, Inc.'s ("Artco") motion to certify order for immediate appellate review, plaintiff PBI's motion for summary judgment against defendant Artco, defendant Artco's cross-motion for summary judgment against

plaintiff, and plaintiff PBI's motion for leave to amend complaint. On June 13, 1991, Magistrate Judge Charles K. McCotter, Jr., filed his Memorandum and Recommendation and Order in which he recommended that the court grant plaintiff PBI's motion to amend complaint; grant plaintiff's motion for summary judgment against defendant Artco; deny defendant Artco's cross-motion for summary judgment; dismiss without prejudice plaintiff's action as against defendant Sharon L. Jelovchan for lack of service of process; and deny defendant Artco's motion to certify order for immediate appellate review.

On June 20, 1991, defendant Artco filed objections to the Magistrate Judge's Memorandum and Recommendation and Order. On June 27, 1991, the plaintiff filed a response to the objections of defendant Artco. Since the time for response has run, this matter is ripe for disposition.

A careful review of the entire record in the case at bar, including Artco's objections and plaintiff's response to defendant's objections, convinces the court that the Magistrate Judge's Memorandum and Recommendation and Order is, in all respects, in accordance with the law and should be approved.

Accordingly, the court adopts the Memorandum and Recommendation and Order of Magistrate Judge McCotter as its own; and for the reasons set forth in the memorandum, the court GRANTS plaintiff's motion to amend the complaint; GRANTS plaintiff PBI's motion for summary judgment as against defendant Artco; DENIES defendant Artco's cross-motion for summary judgment against plaintiff; dismisses without prejudice plaintiff's action as to defendant Sharon L. Jelovchan for lack of service of

process; and DENIES defendant Artco's motion to certify order for immediate appellate review.

It is further ORDERED that the Clerk of Court enter final judgment in favor of plaintiff PBI as against defendants Artco and McClain, jointly and severally, in the amount of $18,946.60 plus prejudgment interest from October 20, 1989, until the date of entry of judgment, and post-judgment interest thereafter until paid, at a rate equal to the coupon issue yield of the average receipted auction price for the last auction of 52-week United States Treasury bills settled immediately prior to the date of judgment.

It is further ORDERED that plaintiff advise the court within ten days of the date of filing of the present order of the status of plaintiff's claim against defendant Pyramid, including whether the plaintiff wishes to continue to pursue the claim following the resolution of the bankruptcy proceedings or to dismiss the proceedings without prejudice against Pyramid pending the outcome of the bankruptcy proceedings.

This the 5th day of July, 1991.

/s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States District Judge

At New Bern, NC
#21

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

| | | |
|---|---|---|
| PEPPER BURNS INSULATION, INCORPORATED, | ) | |
| Plaintiff-Appellee, | ) | |
| and | ) | |
| UNITED STATES OF AMERICA, for the Benefit and Use of Pepper Burns Insulation, Incorporated, | ) | |
| Plaintiff, | ) | |
| v. | ) | No. 91-2178 |
| ARTCO CORPORATION, A Georgia Corporation, | ) | |
| Defendant-Appellant, | ) | |
| and | ) | |
| PYRAMID CONTRACTING, LTD.; JAMES P. MCCLAIN; SHARON L. JELOVCHAN, | ) | |
| Defendants. | ) | |

Appeal from the United States District Court
for the Eastern District of North Carolina,
at Fayetteville.
Malcolm J. Howard, District Judge.
(CA-90-70-3)

Argued: March 3, 1992

Decided: July 10, 1992

Before RUSSELL and LUTTIG, Circuit Judges, and SIMONS, Senior United States District Judge for the District of South Carolina, sitting by designation.

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Reversed and remanded with instructions by published opinion. Judge Russell wrote the opinion, in which Judge Luttig and Senior Judge Simons joined.

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## COUNSEL

**ARGUED**: George Lucus Lewis, ADAMS, GARDNER & ELLIS, P.C., Savannah, Georgia, for Appellant. Julie A. Davis, Allen Holt Gwyn, Jr., PATTON, BOGGS & BLOW, Greensboro, North Carolina, for Appellee. **ON BRIEF**: Perry Y. Newson, HAFER, DAY & WILSON, P.A., Raleigh, North Carolina, for Appellant.

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## OPINION

RUSSELL, Circuit Judge:

This is an appeal from the district court's order granting summary judgment to Pepper Burns Insulation, Inc., a second-tier subcontractor on a federal construction project. Pepper Burns had brought suit against Artco Contracting, Inc., the general contractor on the federal project, to collect under a Miller Act[1] payment bond for work completed but unpaid. Artco moved for summary judgment on the grounds that Pepper Burns failed to meet the statutory prerequisites for maintaining an action. Section 2(a) of the Miller Act requires that notice of a claim be given to the bonded contractor within ninety days of the completion of work. Section 2(b) requires that suit be filed within one year of the completion. We find that Pepper Burns failed to timely give the required notice to Artco. Accordingly, we reverse the district court's order granting Pepper Burns summary judgment and remand for entry of an order dismissing the case against Artco.

### I.

The parties do not dispute the facts of this case. In March 1987, Artco received a contract from the U.S. Army Corps of Engineers to construct the SOCOM Operations Complex[2] at Fort Bragg, North Carolina. In accordance with section 1(a) of the Miller Act, 40 U.S.C.

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[1] 40 U.S.C. §§ 270a-270d (1988).

[2] SOCOM is an acronym for Special Operations Command. The complex serves as a planning center for special military operations.

§ 270a, Artco executed a payment bond for the protection of subcontractors and others furnishing labor and/or material to the project.

Artco hired Pyramid Contracting, Ltd. as a subcontractor. Pyramid, in turn, hired Pepper Burns as a second-tier subcontractor to install flooring. According to an agreement entered into between Pyramid and Pepper Burns dated June 2, 1987, Pepper Burns was to receive $59,466.00 for its work on the project.

Pepper Burns completed its work on July 27, 1989,[3] and submitted invoices to Pyramid for payment. Pyramid paid $40,519.40, leaving a balance due of $18,946.60. No dispute existed between the parties concerning completion of the work or the quality of work or materials supplied. After unsuccessful attempts to collect from Pyramid, Pepper Burns then sought recovery of the unpaid balance from Artco under the payment bond.

Section 2(a) of the Miller Act requires that the party seeking recovery on a payment bond "giv[e] written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made ...." 40 U.S.C. § 270b(a). Therefore, on October 20, 1989, less than 90 days after July 27, Pepper Burns mailed the required notice to Artco of its claim on the bond. Artco received the notice several days later on

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[3] This is the last day Pepper Burns performed any work for or supplied materials to the project.

October 31. Pepper Burns then filed suit against Artco on July 27, 1990.[4]

Artco initially moved to dismiss the case, alleging that Pepper Burns failed to file its complaint within the one year period required by the Miller Act section 2(b). 40 U.S.C. § 270b(b). The district court denied the motion, holding the filing timely under the statute. Pepper Burns then moved for summary judgment. Artco cross-moved for summary judgment on the alternative grounds that Pepper Burns failed to give notice to Artco within ninety days or that Pepper Burns failed to file its complaint within one year. The district court granted summary judgment for Pepper Burns, again holding Pepper Burns' notice and filing timely under section 2 of the Miller Act.

Artco appeals the decision, contending that the district court erred in not granting Artco summary judgment.

II.

We consider this case de novo under the familiar standard for reviewing motions for summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

Although Artco raised two claims on appeal, we find it necessary only to consider its notice claim in order

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[4] Pepper Burns brought suit against Artco, Pyramid and the bond sureties. Neither Pyramid nor the sureties answered the complaint and default judgment was entered against them. Actions against Pyramid were stayed when it filed a Chapter 7 bankruptcy proceeding.

to dispose of this case. The parties do not dispute that notice was mailed by Pepper Burns on October 20, within the statutory ninety-day period, but not actually received by Artco until October 31, outside the statutory window. Thus, we must decide whether mailing or receipt satisfies the notice requirement of § 270b(a).

Section 270b(a) states in part:

> Every person who has furnished labor or material in the prosecution of the work provided for in such [federal] contract, in respect of which a payment bond is furnished under section[] 270a ... and who has not been paid in full therefor ..., shall have the right to sue on such payment bond ...: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made ....

40 U.S.C. § 270b(a) (emphasis in original). The statute clearly requires timely notice as a condition precedent to the right to maintain suit on a payment bond. We can then determine if the properly given notice was timely.

The issue presented here is one of first impression for our Court. We look to other Miller Act decisions for

rules of general construction.[5] Generally, "the Miller Act should receive a liberal construction to effectuate its protective purposes." United States ex rel. Sherman v. Carter, 353 U.S. 210, 216 (1957). The Act was intended to protect from non-payment those who furnish labor and materials in federal construction projects. Id. Yet, the authority to construe liberally the provisions of the Miller Act is not the authority to contravene the plain language of the statute. MacEvoy Co. v. United States, 322 U.S. 102,

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[5] Although other courts have expressed views on this particular question, we find no guidance in their conflicting statements. Only two courts have expressly ruled on the issue. The district court in United States ex rel. Crowe v. Continental Casualty Co., 245 F. Supp. 871, 873 (E.D. La. 1965), specifically held that notice mailed on the ninetieth day was sufficient for purposes of the Miller Act. Subsequently, the court for the Eastern District of New York, relying on the Crowe decision, reached the same conclusion. United States ex rel. Lincoln Elec. Prod. Co. v. Greene Elec. Serv., 252 F. Supp. 324, 327 (E.D.N.Y. 1966) (mailing notice within the ninety-day time period was sufficient), aff'd, 379 F.2d 207 (2d Cir. 1967). We do not find the reasoning in those opinions persuasive.

The Second Circuit in dicta expressed an opposing view in an opinion issued shortly before it affirmed Lincoln Electric. See United States ex rel. Gen. Elec. Co. v. H.I. Lewis Constr. Co., 375 F.2d 194, 200 (2d Cir. 1967) ("notice, however conveyed, must reach the party ... within the statutory time for its receipt"). Similarly, other district courts, in dicta, have indicated that receipt is necessary to satisfy the Miller Act requirement. See, e.g., United States ex rel. Greenwald-Supon, Inc. v. Gramercy Contractors, Inc., 433 F. Supp. 156, 163 (S.D.N.Y. 1977); United States ex rel. Excavation Construction, Inc. v. Glenn-Stewart-Pickney Builders and Developers, Inc., 388 F. Supp. 289, 296 (D. Del. 1975).

107 (1944). Furthermore, we previously exempted from liberal construction the ninety-day limitation on notice provisions. See United States ex rel. Honeywell v. A&L Mechanical Contractors, 677 F.2d 383, 386 (4th Cir. 1982); see also United States ex rel. John D. Ahern Co., Inc. v. J.F. White Contracting Co., 649 F.2d 29, 31 (1st Cir. 1981) (the ninety-day period is a strict condition precedent); United States ex rel. General Dynamics Corp. v. Home Indemnity Co., 489 F.2d 1004, 1005 (7th Cir. 1973) (distinguishing notice requirement from remedial rights of statute, which are to be liberally construed). Although Honeywell concerned a different notice issue, we held that "[s]trict enforcement of [the notice] requirement is necessary ...." 677 F.2d at 386.

Given its plain meaning, the language "giving written notice to said contractor" requires receipt of the notice by the contractor. Mailing does not fully accomplish the condition to "giv[e] ... notice." Such condition requires that the notice actually be "giv[en]," that is, put in the possession of the contractor. In other words, we hold that the statute's language requires actually notifying the contractor. Had Congress chosen different language, we could have reached another outcome. For example, it seems that a statute providing a right of action "upon written notice" would not impose the same requirements on a subcontractor. In that case, mailing would satisfy the statutory condition. Similarly, a right of action granted "upon mailing written notice" would obviously require only mailing. Thus, the statute's authors could easily have stated its directive as a mailing requirement if that was the desired intent. In fact, the statute later discusses mailing

as a permissible method of service,[6] but it does not indicate that mere mailing satisfies the statutory prerequisite to give notice.

This construction is consistent with the legislative purpose underlying section 2(a). In Honeywell, we held that the notice provisions of section 2(a) should be strictly enforced in to order to carry out the design of the statute, that is:

> to give contractors '... ninety days after completion of their work within which to assert a claim against the general contractor and its surety. If it does not do so within that period, the contractor may make final payment to the subcontractor with impunity. It would be quite unfair to the general contractor to expose it to stale claims of which it had no notice during the ninety day period.

Honeywell, 677 F.2d at 386. Likewise, our ruling here provides contractors with a date certain after which they are no longer at risk of liability to second-tier subcontractors. Certainty facilitates payments to first-tier subcontractors and closure of the project finances. Any alternative ruling, it seems, could potentially extend liability for an

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[6] The last sentence of § 270b(a) provides:

> Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence ....

indefinite period of time and thus defeat the purpose of the ninety-day requirement.

Having decided that section 2(a) requires receipt of notice by a contractor, the application of the statute to the facts here is a simple matter. The parties agree that the claim notice was not received until October 31, more than ninety days after completion of work by Pepper Burns. Thus, Pepper Burns did not satisfy the statutory prerequisite for filing an action against Artco on the payment bond.

Accordingly, we reverse the district court order granting summary judgment to Pepper Burns and remand this case for entry of an order dismissing the case against Artco.

REVERSED AND REMANDED WITH INSTRUCTIONS

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED

August 12, 1992

No. 91-2178
CA-90-70-3

PEPPER BURNS INSULATION, INCORPORATED,

Plaintiff - Appellee

and

UNITED STATES OF AMERICA, for the Benefit and Use of Pepper Burns Insulation, Incorporated

Plaintiff

v.

ARTCO CORPORATION, A Georgia Corporation

Defendant - Appellant

and

PYRAMID CONTRACTING, LIMITED; JAMES P. MCCLAIN; SHARON L. JELOVCHAN

Defendants

---

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellee filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Russell, with the concurrence of Judge Luttig and Judge Simons, Senior United States District Judge for the District of South Carolina, sitting by designation.

For the Court,

/s/ Bert M. Montague
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED

August 19, 1992

No. 91-2178
CA-90-70-3

US v. Artco Contracting

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MANDATE

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The judgment of this Court dated 7/10/92 takes effect today.

BERT M. MONTAGUE
CLERK

(2)

Supreme Court, U.S.
FILED
DEC 10 1992
OFFICE OF THE CLERK

No. 92-814

In The

# Supreme Court of the United States

October Term, 1992

PEPPER BURNS INSULATION, INC.,

*Petitioner,*

*vs.*

ARTCO CONTRACTING, INCORPORATED,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

## QUESTION PRESENTED

1. Whether the court below correctly ruled under the Miller Act, 40 U.S.C. §§ 270a-270f the ninety day notice required by 40 U.S.C. § 270b(a) must actually reach the prime contractor within the ninety day statutory time-limit; mailing of the notice within the ninety day period where it is not actually received by the prime contractor outside of the ninety day period is insufficient.

## RULE 28.1 LISTING

Respondent Artco Contracting, Inc. has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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No. 92-814

In the

# Supreme Court of the United States

October Term, 1992

PEPPER BURNS INSULATION, INC.,

*Petitioner,*

*vs.*

ARTCO CONTRACTING, INCORPORATED,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

Respondent Artco Contracting, Inc. respectfully requests this Court deny the Petition for Writ of Certiorari seeking review of the Fourth Circuit's opinion in this case and reported at 910 F.2d 1340.

## STATEMENT OF THE CASE

Respondent refers this Court to the Fourth Circuit's opinion reproduced accurately in the Petition for an accurate Statement of Facts and procedural history of the case.

Two issues were presented to the courts below. The first issue is that which is before this Court: whether a notice seeking to

comply with the Miller Act ninety day notice requirement, 40 U.S.C. § 270b(a), is timely where it is mailed eighty-five days after the last day of work but is not received until over one hundred days after the date on which the Petitioner supplied the last labor and equipment for use on the project. The District Court held the notice was timely. The Fourth Circuit reversed holding that under the plain meaning of the Miller Act and the legislative purpose of the Miller Act, notice had to be received within the ninety day period.

The second issue not addressed by the Fourth Circuit in its opinion is whether the Petitioner timely filed this action. Petitioner completed its work on July 27, 1989. It filed its Miller Act suit on July 27, 1990. Respondent moved for summary judgment contending the suit was filed one day too late to comply with the Miller Act's requirement that:

> No such suit shall be commenced after the expiration of one year after the day on which the last date the labor and material were supplied by [the materialmen].

40 U.S.C. § 270b(b).

The District Court determined, without explication, that the suit was timely filed. The Fourth Circuit specifically declined to address the issue since the ninety day notice requirement issue was dispositive of the case.

If the petition is granted and the issue presented addressed and decided adversely to Respondent, the issue of the timeliness of the institution of the lawsuit by Petitioner must be addressed by the Fourth Circuit Court of Appeals.

## REASONS FOR DENYING THE WRIT

Contrary to the assertion of Petitioner, the Circuit Courts of Appeal are not in conflict on the issue presented and agree with the opinion of the Fourth Circuit. Moreover, state court decisions are not in conflict with the Fourth Circuit's decision, also contrary to Petitioner's assertion, for the simple reason that there are no state court decisions construing the provisions of the Miller Act. Finally, there are no important policy considerations affected by the Fourth Circuit's decision. The decision of the Fourth Circuit is consistent with established law and industry practice and may be readily complied with by subcontractors and materialman with only minimal intrusive effort.

### I.

### THE FOURTH CIRCUIT'S HOLDING BELOW CORRECTLY CONSTRUED THE EXPRESS LANGUAGE OF THE MILLER ACT, 40 U.S.C. § 270b(a).

In relevant part the Miller Act 40 U.S.C. § 270b(a) states:

> Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished . . . and who has not been paid in full therefor . . . shall have the right to sue on such payment bond . . . *provided, however,* That any person having any direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond ***upon giving written notice*** to said contractor ***within***

> ***ninety days*** from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made.

40 U.S.C. § 270b(a) (emphasis added).

The Fourth Circuit correctly determined the language "giving written notice" means notice must be sent and received.

As the court below correctly noted, the plain meaning of the language "giving written notice to said contractor" requires receipt of the notice by the contractor.

> Mailing does not fully accomplish the condition to "giv[e] . . . notice." Such condition requires that the notice actually be "giv[en]", that is, put in possession of the contractor.

Petition at App. 22.

Congress clearly could have provided that the notice was effective "upon sending written notice" or "upon mailing written notice." To give something means to transfer it to the permanent possession of another. A gift is not complete until it is received. Use of the clear expression "giving", rather than "sending" or "mailing" which imply the effectiveness of the notice at the point of transfer rather than the point of receipt, Congress clearly indicated that notice has to be received to be effective.

Accordingly the Fourth Circuit's decision in this case is absolutely correct and in accordance with the plain meaning of the statute.

## II.

## THERE IS NO CONFLICT IN THE COURTS OF APPEALS.

Contrary to Petitioner's assertion that the Fourth Circuit's decision in this case directly conflicts with other Circuit Courts of Appeals' decision, the Fourth Circuit decision is in conformity with the only published Circuit Courts of Appeals opinions which can be found directly addressing this issue.

Only six other published decisions can be located addressing this issue which supposedly is of such importance to our Nation that it must be addressed by this Court as Petitioner asserts. As correctly noted by the court below, besides the instant case, only two courts have expressly ruled on the issue and both of these are district court decisions: *United States ex rel. Crowe v. Continental Casualty Company*, 245 F. Supp. 871, 873 (E.D. La. 1965); *United States ex rel. Lincoln Electric Product Co. v. Greene Elec. Serv.*, 252 F. Supp. 324, 327 (E.D.N.Y. 1966), *aff'd*, 379 F.2d 207 (2nd Cir. 1967) (*Lincoln I*). In both of these cases, the trial court held notice was sufficient for purposes of the Miller Act if it was mailed within the ninety day period. In contrast, the Second and Fifth Circuits have published opinions consistent with the Fourth Circuit's in this case, albeit in *dicta: United States ex rel. Jinks Lumber Company v. Federal Insurance Company*, 452 F.2d 485, 487 (5th Cir. 1971); *United States ex rel. General Electric Company v. H.L. Lewis Construction Company*, 375 F.2d 194, 200 (2nd Cir. 1967). Two other district courts have also in *dicta* reached the same result as the Fourth Circuit: *United States ex rel. Greenwald-Supon, Inc. v. Gramercy Contractors, Inc.*, 433 F. Supp. 156, 163 (S.D.N.Y. 1977); *United States ex rel. Excavation Construction, Inc. v. Glenn Stewart Pinckney Builders and Developers, Inc.*, 388 F. Supp. 289, 296 (D. Del. 1975).

What conflict exists in the circuit courts exists only within the Second Circuit and, interestingly, exists in two decisions authored by Judge Waterman of the Second Circuit only months apart in 1967. Specifically, in *United States ex rel. Lincoln Electric Prod. Co., Inc. v. Greene Elec. Serv.*, 252 F. Supp. 324 (E.D.N.Y. 1966) ("*Lincoln I*"), the District Court held that merely mailing the notice within the ninety day period was sufficient to satisfy the requirements of the Miller Act. *Id.* at 327. After the District Court opinion was issued, but before it was affirmed, the Second Circuit (in *dicta*), in an opinion authored by Judge Waterman in another case, specifically stated the required ninety day Miller Act notice was effective only if it was actually received within the ninety day period. *United States ex rel. General Electric Company v. H. L. Lewis Construction Company*, 375 F.2d 194, 200 (2nd Cir. 1967). Less than four months later, the Second Circuit, also per Judge Waterman, affirmed the District Court opinion in *Lincoln I* (issued prior to *Lewis Construction*) which held that notice only need to be mailed on or before the ninetieth day. The Second Circuit's affirmance of *Lincoln I*, however, did not address the notice issue. Thus the last published opinion of the Second Circuit on this issue is in conformity with the Fourth Circuit here.

Petitioner also asserts the Fourth Circuit's decision conflicts with many state court decisions construing the notice provisions of state mechanics lien statutes. However reference to state court decisions should not be made. The Miller Act was created because a lien cannot attach to Government property. *F.D. Rich Company v. U.S. for the Use of Industrial Lumber Company, Inc.*, 417 U.S. 116, 94 S. Ct. 2157, 40 L. Ed. 2d 703 (1974). The Miller Act providing a federal cause of action, is governed by federal, not state law, and reference to state law either in the construction of the act or in an attempt to create uniformity between state law and federal law is inappropriate. *F.D. Rich Company v. Industrial Lumber Company, Inc.*, 417 U.S. 116, 127.

## III.

## NO IMPORTANT POLICY CONSIDERATIONS AFFECTING GOVERNMENT PROJECTS ARE PRESENTED BY THIS CASE.

Petitioner asserts that the Fourth Circuit's decision creates uncertainty as to the date the Miller Act notice must be sent. Petitioner also asserts the Fourth Circuit's decision "creates an avenue for prime contractors and sureties to avoid their statutory obligations simply by not picking up registered or certified mail." Petition, page 10. Neither position is supportable.

Rather than creating uncertainty, the Fourth Circuit's decision eliminates uncertainty. The purpose of the Miller Act ninety day notice requirement is "to fix a time limit after which the prime contractor can make payment to the subcontractor with certainty that he would not thereafter be faced by claims of those who had supplied labor and materials to the subcontractor." *Bowden v. United States ex rel. Malloy,* 239 F.2d 572, 577-78 (9th Cir. 1956).

> Prime contractors have an obligation to pay their subcontractors; subcontractors have an obligation to pay their suppliers from these funds. Under the Miller Act, prime contractors may also be held liable to the suppliers directly. To avoid such double liability, the Miller Act requires those suppliers looking to the prime contractor for payment to notify the contractor promptly, so that the contractor can withhold sufficient funds from the subcontractor.

*United States ex rel. Blue Circle West, Inc. v. Tuscon Mechanical Contracting, Inc.*, 921 F.2d 911, 914 (9th Cir. 1990).

The ninety day notice requirement is, therefore, for the benefit of the general contractor to give it a date certain when final payment may be made and for the benefit of first tier subcontractors so they can know when they will be paid. It is not for the benefit of second and third tier subcontractors and materialmen. *See United States ex rel. Honeywell v. A & L Mechanical Contractors,* 677 F.2d 383, 386 (4th Cir. 1982); *Noland Co., Inc. v. Allied Contractors, Inc.,* 273 F.2d 917, 920-21 (4th Cir. 1959).

Given that the ninety day notice period is to provide a date certain to the prime contractor after which it may make final payment, it is clear that policy requires that notice must be received within the ninety day period otherwise the requisite certainty is eliminated. The prime contractor would have to await the vagaries of mail delivery before making final payment to the detriment of its immediate subcontractor if Petitioner's position is accepted. Taking the Petitioner's position one step further, if it is assumed that the notice is lost in the mail or is not delivered for a long period of time, the prime contractor and its immediate subcontractor are made to assume the risk of non-delivery. The prime contractor either will delay payment well beyond the ninety day period or will pay at the risk of double liability. For example, if after waiting the ninety day time limit, the prime contractor pays its subcontractor because it had no notice of any claims against the subcontractor and thus the prime contractor actually receives notice of the claim of a second tier subcontractor which was mailed before the ninety day limit under the interpretation advanced by Petitioner, the prime contractor would acquire additional liability to the second tier subcontractor by virtue of its position as principal on the Miller Act payment bond. Requiring the ninety day notice to be received within the statutory time limit would prevent exposing the prime contractor to double liability.

By contrast, the subcontractor or materialman can readily protect itself by either insuring that the requisite notice is received

within the ninety day period or by insuring that the prime contractor has actual knowledge the materialman is looking to it for payment. *See, e.g., United States f/u/o Consolidated Electrical Distributors, Inc. v. Altech,* 929 F.2d 1089 (5th Cir. 1991) (Face to face meeting between materialman and general contractor followed up by a letter confirming the meeting satisifes the ninety day notice requirement if the meeting is held within the ninety day period).

The issue of policy then is whether a materialman or the prime contractor must assume the risk of an undelivered or late delivered notice. The prime contractor cannot protect itself; the materialman can. The materialman knows when it has not been paid; the prime contractor does not. The materialman can send the notice the day after it last supplies material labor to the project. This notice can be imparted through an actual meeting, federal express delivery or any other means to facilitate actual notice on the contractor's behalf. *See, e.g., United States ex rel. United States f/u/o Consolidated Electrical Distributors v. Altech, Inc.*, 929 F.2d 1089 (5th Cir. 1991). It may even send the notice by certified mail which, if it is not delivered within ten days, will be returned to the materialman allowing it sufficient time for alternative service. Placing this minimal inconvenience on the materialman eliminates an onerous burden and huge financial risk on the prime contractor and delivers certainty to the timing of payment of claims on federal construction projects. As the court below correctly noted, its ruling:

> Provides contractors with a date certain after which they are no longer at risk of liability to second-tier subcontractors. Certainty facilitates payments to first-tier subcontractors and closure of the project finances. Any alternative ruling, it seems, could potentially extend liability for an indefinite period of time

> and thus defeat the purpose of the ninety day requirement.

*P. App.* 23-24.

The question of policy then dictates that the notice must be received within the ninety day time period.

The court below's reading of the Miller Act serves the purpose of the Miller Act's notice requirement to protect the prime contractor "by fixing the date beyond which, in the absence of notice, he will not be liable for the subcontractor's debts." *Noland Co., Inc. v. Allied Contractors, Inc.*, 273 F.2d 917, 920-21 (4th Cir. 1959). While the provisions of the Miller Act are to be construed liberally in favor of those supplying labor or materials, the Miller Act is in derogation of common law and imparts extra-contractual liability on the prime contractor. The Miller Act should not be construed any more broadly than the express language of the Act. It also should not be construed so as to take any and all protections away from the prime contractor as provided by Congress.

## CONCLUSION

Respondent Artco Contracting, Inc. respectfully requests that the Petition for Certiorari be denied. The court below reached a correct result in this case and properly construed the Miller Act's ninety day notice requirement in conformity with the plain language of the statute and the policy of the Act.

Respectfully submitted,

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(3)

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No. 92-814

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

PEPPER BURNS INSULATION, INC.,
*Petitioner,*
v.
ARTCO CONTRACTING INCORPORATED,
*Respondent.*

**BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI BY AMERICAN SUBCONTRACTORS ASSOCIATION, INC. AMERICAN FIRE SPRINKLER ASSOCIATION, AMERICAN INSTITUTE OF STEEL CONSTRUCTION, ASSOCIATION OF THE WALL AND CEILING INDUSTRIES - INTERNATIONAL, INSULATION CONTRACTORS ASSOCIATION OF AMERICA, NATIONAL GLASS ASSOCIATION, NATIONAL INSULATION AND ABATEMENT CONTRACTORS ASSOCIATION, NATIONAL ROOFING CONTRACTORS ASSOCIATION, AND PAINTING AND DECORATING CONTRACTORS OF AMERICA**

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## I. INTRODUCTION

The *Amici Curiae* join in submitting this Brief in support of the *Petition for Writ of Certiorari*, pursuant to Rule 37.2 of the United States Supreme Court Rules, upon the written consent of all parties.[1]

## II. INTEREST OF THE AMICI

The several *Amici Curiae* joining in submission of this Brief are separate and independent construction industry trade associations whose memberships are comprised of businesses of all sizes which provide labor and materials in various sub-trade and specialty-trade areas on construction projects throughout the United States.[2] Constituent members of each *Amicus Curiae*

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[1] Letters from counsel for Petitioner and Respondent have been submitted to the Court as evidence of the parties' consent to the filing of the instant *Amicus* brief.

[2] (1) American Subcontractors Association, Inc. ("ASA")
1004 Duke Street
Alexandria, Virginia 22314-3512

ASA's membership consists of approximately 6,500 companies who generally function as subcontractors, suppliers, fabricators and manufacturers supplying labor, material and services to the construction industry.

(2) American Fire Sprinkler Association ("AFSA")
1325 Pegasus, Suite S220
Dallas, Texas 75238

AFSA's membership consists of approximately 600 companies who generally function as subcontractors,

suppliers, fabricators and manufacturers of fire protection systems for installation into construction projects.

(3) American Institute of Steel Construction ("AISC")
1 East Wacker Drive, Ste. 3100
Chicago, Illinois 60601-2001

AISC's membership consists of approximately 2,900 engineering professionals and fabricating companies who are involved in utilization of structural steel for construction projects.

(4) Association of the Wall and Ceiling Industries - International ("AWCI")
1600 Cameron Street, Ste. 200
Alexandria, Virginia 22314-2705

AWCI's membership of approximately 1,300 companies is involved generally in the performance of acoustical tile, drywall, lathing and plastering, and fireproofing construction trades.

(5) Insulation Contractors Association of America ("ICAA")
15819 Crabbs Branch Way
Rockville, Maryland 20855

ICAA's membership consist of approximately 350 members who are involved in the manufacture and installation of insulation materials on construction projects.

(6) National Glass Association ("NGA")
8200 Greensboro Drive, Ste. 302
McLean, Virginia 22102

NGA's membership of approximately 2,900 companies represent manufacturers, fabricators, and installers of glass and glazing systems on construction projects.

(7) National Insulation and Abatement Contractors Association ("NIACA")
99 Canal Center Place, Suite 222
Alexandria, Virginia 22314

often participate in the construction of federal public works projects, frequently at the "second tier" level where they are engaged as sub-subcontractors or suppliers to "first tier" subcontractors engaged directly by the prime contractors in privity with the government.

Most of the labor and materials required for construction of federal construction projects is generally provided by subcontractors and suppliers who do not have a direct contractual relationship with or recourse against the government or, indeed, even the prime contractor. Since mechanics' and materialmen's lien

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NIACA's membership consists of approximately 600 companies performing insulation and asbestos abatement work on construction projects.

(8) National Roofing Contractors Association ("NRCA")
10255 West Higgins Road
Rosemont, Illinois 60018

NRCA's membership of approximately 3,350 companies represents manufacturers, applicators and subcontractors involved in the installation of commercial and industrial roof systems.

(9) Painting and Decorating Contractors of America ("PDC")
3913 Old Lee Highway, Ste. 33B
Fairfax, Virginia 22030

PDC's membership of approximately 3,200 companies is involved as suppliers and applicators of coatings, paint and wall covering on construction projects.

rights do not attach to such public works, the only form of security for payment generally available to "second-tier" suppliers and subcontractors is afforded by payment bonds required under the Miller Act. 49 Stat. 793, as amended 80 Stat. 1139, 40 U.S.C. §270a - 270f. These statutory rights are significantly jeopardized by the United States Court of Appeals for the Fourth Circuit in its restrictive application of the written notice requirements under 40 U.S.C. §270b(a) to the instant case.[3]

Indeed, the sufficiency of notice is one of the most frequent sources of dispute concerning Miller Act payment bond claims, which often turn on whether this condition precedent to entitlement has been satisfied. Thus, for the substantial number of persons providing labor and materials for construction of virtually every federal public work, reasonableness, clarity and predictability in the application of this notice requirement are absolutely essential to preservation of the Miller Act protections created for their benefit. Unfortunately, the Fourth Circuit's restrictive interpretation in its decision below will substantially

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[3] *Pepper Burns Insulation, Inc. v. Artco Contracting, Incorporated*, 970 F.2d 1340 (4th Cir. 1992).

increase the difficulty of effecting timely and proper written notice and multiply the already significant risks of non-payment borne by second-tier subcontractors and suppliers.[4]

Accordingly, these associations and their constituent members join as *Amici Curiae* in support of the *Petition for Certiorari* seeking review of the decision of the United States Court of Appeals for the Fourth Circuit.

## III. SUMMARY OF ARGUMENT

In effect, the Court of Appeals has held that a subcontractor or supplier who sends notice of its claim to the prime contractor in precise compliance with the notice requirements of the statute can be deprived of his right to proceed by the prime contractor's delay in accepting delivery of such notice.

This ruling has contravened the letter and spirit of the Miller Act, departed from principles of interpretation

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[4] The impact of the Fourth Circuit's decision will likely be felt far beyond its direct application to federal construction projects since virtually all of the states have enacted "Little Miller Act" legislation patterned after the Federal Miller Act. In construing the state versions of the act, state and federal courts alike have looked for guidance to cases construing the Federal Miller Act. Unless modified by this Court, therefore, the rule of construction laid down by the Fourth Circuit in the instant case has the potential to be applied by courts at every level to limit the access of countless subcontractors and suppliers to the protections of Miller Act legislation.

enunciated by this Court, contradicted the holdings of other federal courts addressing this issue, and generally increased confusion and uncertainty relative to the "giving written notice" requirement of 40 U.S.C. §270 b(a). The Fourth Circuit's restrictive ruling interprets this language to require actual receipt by the contractor within the statutory ninety day notice period, even when notice is "served" substantially in the manner directed by the statute. Not only is this view contrary to established legal principles, but it also will undercut the firm federal policy recognizing that the remedial purpose of the Miller Act requires that it be liberally interpreted in favor of the subcontractor and supplier claimants. Once written notice has been "giv[en]" via "service" by registered mail, as specified, the claimant has no further control over the timing of delivery and receipt. Ironically, the prime contractor then becomes the party in control of when the notice is actually received.

This was not the intent of Congress. Moreover, any benefit the decision may have in effectuating finality is overwhelmingly outweighed by the potentially devastating consequences for those whom the Act was intended to benefit.

## IV. ARGUMENT OF *AMICI CURIAE*

### A. THIS COURT SHOULD RESOLVE THE EXISTING CONFLICT AND CONFUSION REGARDING INTERPRETATION OF "NOTICE" FOR PURPOSES OF 40 U.S.C. §270b(a).

This Court has consistently recognized that the Miller Act requires a government contractor to post a surety payment bond "for the protection of all persons supplying labor and materials in the prosecution of the work provided for" in the contract. F.D. Rich Co., Inc. v. United States for the Use of Industrial Lumber Company, Inc., 417 U.S. 116, 118 (1974). Furthermore, this Court has recognized that the Miller Act is "highly remedial in nature" and is therefore "entitled to a liberal construction and application in order to properly effectuate the congressional intent to protect those whose labor and materials go into public projects." Clifford F. MacEvoy Co. v. United States for the Use and Benefit of Calvin Tomkins Co., 322 U.S. 102, 107; See also, J.W. Bateson Company, Inc. v. United States ex rel. Board of Trustees of the National Automatic Sprinkler Industry Pension Fund, 434 U.S. 586 (1978); Fleisher Engineering and Construction Co. v. United States for the Use and Benefit of Hallenbeck, 311 U.S.

15 (1940). The decision of the United States Court of Appeals for the Fourth Circuit below that the written notice required of second-tier subcontractors must actually be received by the prime contractor within the ninety-day period deviates from these well-established principles and contravenes the spirit, if not the letter, of applicable decisions of this Court.

The holding of this Court in Fleisher Engineering, does not compel the result reached in the Fourth Circuit opinion below. There, this Court opined that:

> In giving the statute a reasonable construction in order to effect its remedial purpose, we think that a distinction should be drawn between the provision explicitly stating the condition precedent to the right to sue and the provision as to the manner of serving notice. The structure of the statute indicates the distinction. The proviso, which defines the condition precedent to suit, states that the material-man or laborer "shall have a right of action upon the said payment bond upon giving written notice to said contractor" within ninety days from the date of final performance. The condition as thus expressed was fully met. Then the statute goes on to provide for the mode of service of the notice. "Such notice shall be served by mailing the same by registered mail, postage prepaid", or "in any manner" in which the United States marshal "is authorized by law to serve summons". We think that the purpose of this provision as to manner of service was to assure receipt of the

> notice, not to make the described method mandatory so as to deny right of suit when the required written notice within the specified time had actually been given and received. In the face of such receipt, the reason for a particular mode of service fails. It is not reasonable to suppose that Congress intended to insist upon an idle form. Rather, we think that Congress intended to provide a method which would afford sufficient proof of service when receipt of the required written notice was not shown.

311 U.S. 15, 18. Thus, where a claimant elects to use a mode of effecting notice other than that specified, the timeliness of the notice must be measured by when it was actually received since the claimant controlled when it would be received. However, when the claimant "gives written notice" in substantially the manner specified by "serving" it by a properly posted and addressed "registered mail" transmittal, the timeliness should rather be measured by the date of transmittal - the last act within the control of the claimant.

Furthermore, as set forth in the *Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit*, the decision of the Fourth Circuit evidences a growing split among the circuits with respect to the current state of the law regarding this critical issue

of measuring the timeliness of the notice required by 40 U.S.C. §240b(a).[5]

Unless the Fourth Circuit's restrictive application is overturned, second-tier subcontractors and suppliers on federal construction projects will henceforth be left with only conjecture and speculation as to when they must mail written notice to assure that it will actually be received by the prime contractor within the ninety-day notice period.

### B. THE DECISION BELOW CONTRAVENES THE REMEDIAL PURPOSE OF THE MILLER ACT AS WELL AS ITS LETTER AND SPIRIT.

The protection of a Miller Act payment bond extends no further than the second tier level of subcontractors and suppliers. J.W. Bateson Company, Inc. v. United States ex rel. Board of Trustees of the National Automatic Sprinkler Industry Pension Fund, 434 U.S. 586 (1978). Further, the Miller Act requires

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[5] The decision below runs contrary to rulings by the United States District Court for the Eastern District of New York, which was affirmed by the United States Second Circuit Court of Appeals, and the United States District Court for the Eastern District of Louisiana. On the other hand, several United States District Courts in other circuits have reached results similar to that of the Fourth Circuit in its decision below.

that such persons shall have a right of action upon the payment bond only "upon giving written notice" to the contractor "within ninety days" from the date on which they last supplied labor or materials for which claim is made. 40 U.S.C. §270b(a) (emphasis added). The statute further provides that "[s]uch notice shall be served by mailing the same by registered mail, postage pre-paid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence. . . ." Id. (emphasis added). Since the Miller Act must be liberally construed to further its purpose of protecting subcontractors and suppliers, the plain meaning of this notice requirement is that the claimant must only "give" the written notice by "serving" it by mail in the manner precisely specified by the statute within the ninety-day period within which such notice must be given.

The mode of service expressly provided by Congress is calculated to permit clear proof of the date upon which such notice was served by deposit of the notice with the U.S. Postal Service. The language clearly suggests an intention to be guided by the procedural rule generally governing "service" of papers in civil actions

which provides that "service by mail is complete upon mailing." Rule 5(b), Federal Rules of Civil Procedure.

Indeed, once the second-tier subcontractor or supplier has given service of such written notice in the manner prescribed, it has done all that it can do to assure that such notice will be promptly delivered. The time within which delivery and receipt of such notice will actually be effected is then totally beyond the subcontractor's control. Even more importantly, the time ultimately consumed between the date the subcontractor deposits a properly posted and addressed letter by registered mail[6] with the U.S. Postal Service until its actual receipt by the contractor cannot be anticipated or predicted.[7] Under the Fourth Circuit's

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[6] In all material respects, mailing by "registered" or "certified" mail is virtually identical. See, 39 C.F.R. §3001, Subpt. C, App A 5.01, 14.01. The only difference is the way in which the matter is received by the post office and the optional indemnity in case of damage or loss available to the senders of registered mail.

[7] The timing of such transmission and delivery will be controlled by such factors as:

(a) the time usually required by the U.S. Postal Service to specially receive, process and ultimately deliver the registered mail transmittal to the addressee;

(b) to the extent that the contractor employs an unattended mail box or a post office box for delivery of mail, the additional time that will be consumed

restrictive interpretation, the timeliness of such written notice is left entirely in the control of the prime contractor who may elect to defer actual receipt simply by delaying pick up of the registered mail transmittal at the post office. The fox is left fully in charge of the hen house!

Given the statute's clear remedial intent to protect payment rights of subcontractors and suppliers, it is inconceivable that Congress intended to burden such claimants at the second-tier level with this additional, unmanageable risk of the unknown. In its apparent zeal to protect the interests of prime contractors by providing "a date certain after which they are no longer at risk of liability to second-tier subcontractors", the Fourth Circuit's ruling below would effectively deny to second-tier subcontractors and suppliers a "date certain" by which the required written notice must be served by properly addressing and posting it in the manner

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until the contractor elects to pick up such a registered mail transmittal at the post office once the post office has left notice in the contractor's box that such a letter is being held for acknowledgement of receipt and delivery; and

(c) any other additional, unforeseeable delays incurred in the delivery or transmittal process.

specified. Clearly, the purpose of the Miller Act is better served by only requiring that such claimants must give notice by serving it in the manner provided by depositing it in the mail with the U.S. Postal Service within the specified ninety-day period.

### C. THE DECISION BELOW DOES NOT EFFECTIVELY ADDRESS THE COURT'S CONCERNS REGARDING FINALITY.

The Fourth Circuit's concerns about prime contractors' ability to protect themselves from duplicate liability to second-tier subcontractors can be addressed effectively in a number of other ways more consonant with the liberal application of the Miller Act payment bond protection. Indeed, this Court has previously noted that the relatively few first-tier subcontractors performing work on construction projects are generally well-known to the prime contractor. Consequently, "[i]t is easy for the prime contractor to secure himself against loss by requiring the subcontractors to give security bond, or otherwise, for the payment of those who contract directly with the subcontractors." F.D. Rich Co., Inc. v. United States for the Use of Industrial Lumber Company, Inc., 417 U.S. 116, 123 (1974), quoting Clifford F. MacEvoy Co. v. United States for the Use and Benefit of Calvin

Tomkins Co., 322 U.S. 102, 110 (1944). Indeed, the prime contractor is in the best position to protect itself from claims by second-tier subcontractors and suppliers by contractually requiring the first-tier subcontractors to identify and attest to the payment status of all second-tier subcontractors and suppliers. Additionally, the prime contractor may require appropriate waivers and releases from such second-tier subcontractors and suppliers as a pre-condition to releasing payment to the first-tier subcontractors.

In any case, since a prime contractor is often not fully aware of when certain second-tier subcontractors and suppliers have ceased providing labor and materials, it is generally not even aware of when the ninety-day notice period commences to run regarding the numerous second-tier subcontractors and suppliers. Thus, the Fourth Circuit's suggestion that the prime contractor should be able to protect itself by waiting ninety days before release of payment to the first-tier subcontractors is simply erroneous. Instead, proper administration of the first-tier subcontracts by the prime contractor affords the prime contractor the greatest degree of protection of unanticipated liability to unpaid second-tier subcontractors and suppliers.

Finally, the realities of the payment process on most federal construction projects further underscore the unreasonableness and impracticality of the Fourth Circuit's interpretation of the written notice requirement. The payment process itself can easily consume much of the ninety-day notice period after the last labor or material is provided before the subcontractor has reason to believe the contractor has defaulted on his payment obligation. Thus, the claimant may have to wait well into the ninety-day notice period before it may even reasonably determine whether it must give notice of its claim in order to preserve its rights under the bond.[8]

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[8] On most federal construction projects, progress payments are made on a monthly basis until completion, at which time final payment is made. Generally, the prime contractor requires its subcontractors (and, in turn, their sub-subcontractors and suppliers) to submit payment applications for work and materials provided during a particular monthly payment period in order to be included in the prime contractor's payment application to the government for that month. Thus, hypothetically, a second-tier subcontractor who provided its last labor and materials during a particular month would not initiate its payment request until the end of the payment period.

At the end of the month, the prime contractor typically gathers all subcontractor and supplier payment requests for that period and incorporates such requests into its own payment application to be submitted to the government. From the date of submission of that application at the end of the month, the government is afforded from fourteen (14) to thirty (30) days from receipt of the prime contractor's payment application under the Prompt Payment Act to make payment under the prime contract.

On the other hand, under the ruling of the Fourth Circuit below, the claimant assumes the full risk of estimating how long transmission and delivery of a properly posted and addressed written notice will take in order to be received by the contractor within ninety (90) days of its last work on the project. In an abundance of caution, then, the claimant would have to allow two to three weeks for actual delivery and receipt of such notice

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39 U.S.C. §3903(a)(1) and (a)(6) (confirmed). Sections 4(e) and 10(a)(1) and (3), OMB Circular No. A-125, 54 FR 52700, December 21, 1989, ¶26,840 *Government Contractors Reporter*, Vol. 5 (Commerce Clearing House). Thereafter, under the Prompt Payment Act, the prime contractor is allowed up to seven (7) days after its receipt of payment from the government to pay the first-tier subcontractors and each first-tier subcontractor is, in turn, similarly entitled to an additional seven (7) days after its receipt of payment within which to effect payment to the second-tier subcontractors and suppliers. 39 U.S.C. §3905(b)(1) and (c).

Thus, even assuming that no delays in the processing of payment occur for the reasons permissible under the Prompt Payment Act, payment to a second-tier subcontractor would not even be due until approximately forty-four (44) days after submission of the prime contractor's pay application to the government (i.e., 30 days + 7 days + 7 days). Furthermore, hypothetically, had the second-tier subcontractor last provided labor or materials on the 10th of the month, approximately twenty (20) days could expire after the subcontractor's last work before the prime contractor's pay application covering such work would be submitted to the government. Coupled with the forty-four day payment sequence under the Prompt Payment Act, this would mean that that second-tier subcontractor or supplier may not even be "due" payment until approximately sixty-four (64) days after it last provided labor or materials to the project.

after the date of mailing. (Indeed, in the case below there was an eleven day lapse between mailing and delivery). Thus, the point in time when the subcontractor must actually mail its written notice would be substantially earlier than the end of the ninety-day period specified by the Miller Act, perhaps even as soon as seventy to seventy-five days after its last work on the project.

As a practical matter, this will give claimants a relatively short time, perhaps as little as two weeks between when they would first reasonably expect to receive payment and when they must mail notice to the prime contractor of any non-payment. This compression of the notice period will require second-tier subcontractors to routinely mail written notice to contractors much sooner than the end of the ninety-day statutory period and result in such notices being given even before the routine payment process has been given a full opportunity to work. This proliferation of early notices of non-payment required by the Fourth Circuit's interpretation of the notice requirement will create confusion, uncertainty and delay in the payment process which will likely far outweigh any benefit to that process

contemplated by the Fourth Circuit in reaching its determination.

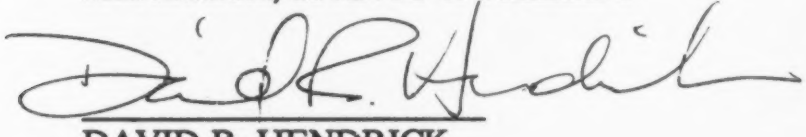
## V. CONCLUSION

The impact of this decision goes far beyond the interests of the individual litigants and raises the specter of a procedural "catch 22" for the very individuals and entities the Miller Act was adopted to protect. Congress enacted the Miller Act in an effort to render the playing field on which contractors and their subcontractors settle payment disputes somewhat more level. Unless overturned by this Court, the Court of Appeals decision may deprive subcontractors of access to the field at all.

Wherefore, the *Amici* respectfully submit that a *Writ of Certiorari* should issue from this Court to the United States Court of Appeals for the Fourth Circuit and that the decision of the Court below should be reversed and the matter remanded with instruction to enter summary judgment on behalf of Petitioner.

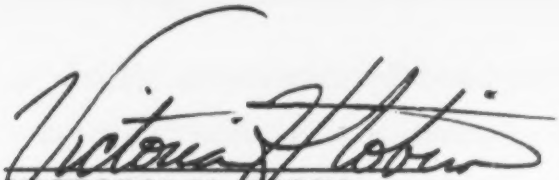
Respectfully submitted,

HENDRICK, SPANOS & PHILLIPS



DAVID R. HENDRICK

[SIGNATURE OF COUNSEL CONTINUED]



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